

FILED IN CLERK'S OFFICE  
U.S.D.C.-Atlanta

MAY 11 2005

LUTHER D. THOMAS, Clerk  
By: *[Signature]*  
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**TONY L. WARE, CEO and  
T. L. WARE BOTTLING CO., INC.,**

**Plaintiffs,**

**vs.**

**FLEETBOSTON FINANCIAL CORP.  
F/K/A BANKBOSTON CORP.**

**Defendant.**

)  
)  
)  
)  
)  
) **CIVIL ACTION FILE NUMBER:**  
) **1:05-CV-0426-MHS**  
)  
) **REVISED MOTION TO REMAND**  
)  
) **MEMORANDUM OF LAW IN SUPPORT**

**REVISED MOTION TO DISMISS AND REMAND CASE**

**COMES NOW, TONY L. WARE, CEO and T.L. WARE BOTTLING COMPANY, INC.,** the Plaintiffs and files their Revised Motion to Remand Case pursuant to the **Federal Rules of Civil Procedures, Rule 12(h)(3)** against the above-named Defendant **FLEETBOSTON FINANCIAL CORPORATION.** The Court must remand on Plaintiffs' motion pursuant to **28 U.S.C. § 1447(c)** this civil action back to the Superior Court of Fulton County on the following grounds to wit:

**I. DEFECTS IN THE REMOVAL PROCESS**

1. The Court is required to remand this civil matter because the Notice of Removal is legally insufficient as it is untimely under 28 U.S.C. §1446(b) filed 34 days late after both FleetBostons corporations were served with the initial Summons and Complaint on December 10<sup>th</sup>, 2004. The Court must remand this case back to the Superior Court of Fulton County because the Notice of Removal is untimely.

2. That FleetBoston Financial Corporation f/k/a BankBoston Corporation a Rhode Island corporation was the only named Defendant in this action and not FleetBoston Financial Corporation a Delaware corporation. There are two



1 FleetBoston Financial Corporation. One corporation is a "Place Holder Corporation"  
 2 or "Shell or Dummy" corporation used by the above named Defendant to mislead the  
 3 Plaintiff, the Court and the general public and the other is a holding company merged  
 4 with Bank of America. However, both corporations were properly served with  
 5 Summons and Complaint through the Georgia Secretary of State on December 10<sup>th</sup>,  
 6 2004 because both corporations had withdrawn from doing business in this State  
 7 which legally appointed the Georgia Secretary of State to be their agent for all service  
 8 of process. Only Defendant FleetBoston Financial Corporation f/k/a BankBoston  
 9 Corporation a Rhode Island corporation had the right to remove this case as a matter  
 10 of law. FleetBoston Financial Corporation of Delaware needed FleetBoston Financial  
 11 Corporation f/k/a BankBoston Corporation of Rhode Island's consent prior to the  
 12 removal of the Plaintiffs' case under the unanimity rule set by the Court of Appeals for  
 the Eleventh Circuit. See, In re Bethesda Mem'l Hosp., Inc., 123 F.3d 1407, 1410  
 n.2 (11<sup>th</sup>, Cir 1997) ("The failure to join all defendants in the petition is a defect in the  
 removal procedure").

13 3. FleetBoston Financial Corporation f/k/a BankBoston Corporation of Rhode  
 14 Island and FleetBoston Financial Corporation of Delaware both waived their legal  
 15 rights to remove this action when they appointed the Georgia Secretary of State to be  
 16 their agent for service of process and submitted to the jurisdiction of the State Court.

## 17 **II. THE COURT LACKS SUBJECT MATTER JURISDICTION**

18 4. The Court lacks subject matter jurisdiction over this civil matter because it  
 19 lacks original jurisdiction over Federal RICO. Although Federal RICO claims may be  
 20 within the Court's jurisdiction. All state Courts have RICO statutes which  
 21 incorporates the Federal RICO statute. The State Courts in this manner enjoys  
 22 concurrent jurisdiction with District Courts over Federal RICO claims. This Court  
 23 does not have removal subject matter jurisdiction over Federal RICO claims under 18  
 24 U.S.C. 1961 even though Federal RICO may raise a federal question under 28  
 U.S.C. § 1331. See, Cogdell v. Wyeth, 366 F.3d 1245, 1247 (11<sup>th</sup>, Cir 2004).<sup>1</sup>

---

25 <sup>1</sup> Thus Cogdell Supra held that ("Thus, one prerequisite for removal jurisdiction is that the  
 case originated in the state court. Another is that the defendant remove the case to the proper federal



1        5. The Court lacks subject matter jurisdiction over this civil matter under 28  
 2 U.S.C. § 1332(a)(1) because the Plaintiffs, Defendant FleetBoston Financial  
 3 Corporation f/k/a BankBoston Corporation and FleetBoston Financial Corporation of  
 4 Delaware are not diverse in this action and all are citizens of the State of Georgia.  
 5 The FleetBostons are both deemed citizens of this State pursuant to 28 U.S.C. §  
 1332(c)(1) which reads as follows:

6                    **“(c) For the purposes of this section and section**  
 7                    **1441 of this title – (1) a corporation shall be deemed to**  
 8                    **be a citizen of any State by which it has been**  
                   **incorporated and of the State where it has its principal**  
                   **place of business...”**

9        Its clear from the holding in Louisville & NRR v. Meredith, 66 Ga. App. 488,  
 10 18 SE2d 51 (1941) that FleetBoston of Rhode Island and FleetBoston of Delaware by  
 11 filing their applications for a Certificate of Authority with the Georgia Secretary of  
 12 State’s they had a “principal place of business” in Georgia before it withdrew from  
 13 doing business in this State. Therefore, the FleetBostons were legal citizens of  
 14 Georgia pursuant to 28 U.S.C. § 1332(c)(1) and are not diverse in this civil action.  
 15 The Court lack diversity subject matter jurisdiction under 28 U.S.C. § 1332(a)(1).

16        6. The Court lacks subject matter jurisdiction over this civil matter because the  
 17 Notice of Appeal to the Supreme Court of Georgia made the Notice of Removal moot  
 18 as a matter of law. Plaintiff Tony L. Ware was appealing the final judgment and all  
 19 orders issued in this action. Mr. Ware’s appeal was subject to review by the Georgia  
 20 Supreme Court. Thus, the right of remove this action was no longer a live issue.  
 21 Because FleetBoston Financial Corporation of Delaware is a dissolved corporation it  
 22 lacks a legally cognizable interest in the outcome of this civil action. FleetBoston’s  
 23 attorneys knew that such Notice of Appeal vests the Georgia Supreme Court with  
 24 subject matter jurisdiction over Plaintiff’s appeal pursuant to O.C.G.A. § 5-6-47(a)  
 prior to its improper removal. Therefore this Court lacks subject matter jurisdiction on  
 moot questions and to remove appellate jurisdiction from the Georgia Supreme

---

25        district court. A third is that the federal district court have original jurisdiction to entertain the law suit.  
 If any one of these prerequisites is lacking, the district court can be said to lack removal jurisdiction”).




1 Court. See, Westmoreland v. National Transportation Safety Board, 833 F.2d  
 2 1461, 1462 (11<sup>th</sup>, Cir 1987). Furthermore, FleetBoston of Delaware also lacks  
 3 standing to remove Plaintiffs' civil action under O.C.G.A. § 14-2-1401.

4 7. That FleetBoston Financial Corporation of Delaware lacks legal standing as  
 5 a dissolved corporation and is barred under Georgia Law from bringing or  
 6 maintaining any removal proceeding as a dissolved corporation without having first  
 7 obtained new a Certificate of Authority from the Georgia Secretary of State pursuant  
 8 to O.C.G.A. § 14-2-1502(a). Thus, the right to remove this action was no longer a  
 9 live issue because FleetBoston Financial Corporation of Delaware is a dissolved  
 10 corporation and lacks a legally cognizable interest in the outcome of Plaintiffs' case  
 11 and removal is moot.

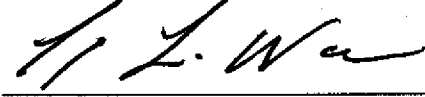
12 **WHEREFORE**, The Plaintiffs hereby prays and demands that this Court  
 13 enter a FINAL ORDER dismissing Defendant's claims for lack of subject matter  
 14 jurisdiction<sup>2</sup> and remand this civil action back to the Superior Court of Fulton County  
 15 and the Georgia Supreme Court so that the Plaintiffs in this matter can protect their  
 16 legal rights as a matter of law. The Plaintiffs request any further relief deemed proper  
 17 and just by the Court: Plaintiff's Attorney request all attorney fees and Costs.

18 This 11 MAY, day of MAY, 2005.

19 Respectfully Submitted By:

20   
 21 Michael R. Johnson, Sr.  
 22 Attorney for the Plaintiff  
 23 Georgia Bar No. 395056  
 24 Johnson & Associates, P. C.  
 25 340 West Peachtree Street, N.E.  
 Suite 200  
 Atlanta, Georgia 30308  
 (404) 688-7100

Respectfully Submitted By:

  
 Tony L. Ware, JD, Plaintiff  
 Chairman & CEO  
 P. O. Box 150524-Dept. 0227  
 Atlanta, Georgia 30315-0188  
 (404) 945-0342

<sup>2</sup> In Westmoreland v. National Transportation Safety Board, 833 F.2d 1461, 1462 (11<sup>th</sup>, Cir 1987) district courts lacks subject matter jurisdiction on moot issues. Mootness is jurisdictional. See also Murphy v. Hunt, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982).

